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80-1818

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

James E. McLendon, Jr.,

Appellant

vs.

State of Alabama
Department of Revenue,

Appellee.

Appeal From the Alabama Court
of Civil Appeals

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I

Whether the requirement of posting a bond before judicial review is permitted creates an artificial classification which discriminates against the poor in violation of the Equal Protection Clause of the Fourteenth Amendment.

II

Whether the Code of Alabama, 1975, 40-2-22, violates the Due Process Clause of the Fourteenth Amendment by providing for the taking of property to satisfy a tax assessment without providing for either a pre-seizure or post-seizure trial on the merits before an impartial tribunal.

OPINION BELOW

The opinion of the Court of Civil Appeals is not yet reported, but is set forth in the Appendix, infra, pp.A1-8.

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JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1275(2), this being an appeal which draws into question the validity of Code of Alabama, 1975, 40-2-22 infra Appendix p.A9-17 on the ground that it is repugnant to the Constitution of the United States.

A tax assessment was levied against the Appellant by the State of Alabama, Department of Revenue. The Appellant filed a Notice of Appeal to Circuit Court, and, as required by the statute, filed a bond which was thereupon rejected by the Clerk of the Court.

The Notice of Appeal filed February 4, 1980, with the Circuit Court of Jefferson County, Alabama, initially raised the federal question of the constitutionality of the statute

(40-2-22). The Motion to Dismiss filed by the State of Alabama Department of Revenue was granted on March 13, 1980, based on the prior ruling of the Supreme Court of Alabama (Ex parte State ex rel. Attorney General, 252 Ala. 149, 39 So.2d 669 (1949).

The decision of the Judge of the Circuit Court was appealed to the Supreme Court of Alabama by the Appellant on April 10, 1980. The matter was transferred by the Supreme Court to the Court of Civil Appeals. The basis for the appeal was that the statute violated both the United States Constitution and the Alabama Constitution. The specific federal constitutional provisions presented and argued in Appellant's briefs in support of his appeal were the Due Process Clause and the Equal

Protection Clause of the Fourteenth Amendment.

The Court of Civil Appeals found the statute to be constitutional and affirmed the dismissal of the action by the lower court on September 17, 1980. In its opinion, the Appellate Court recognized that the appeal was based on violation of both the Alabama Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Based on a prior ruling of the Supreme Court of Alabama concerning the statute which was the forerunner of 40-2-22, it found that this statute did not violate these constitutional provisions. The State court additionally based its decision upon nonfederal grounds, discussed hereinafter. The decision of the Court

of Civil Appeals, expressed in broad general terms, failed to discuss the Due Process violations of the Equal Protection clause or the Fourteenth Amendment specifically. Instead the Court made a blanket statement that these provisions were not violated.

The Writ of Certiorari to the Supreme Court of Alabama was denied without opinion on January 30, 1981. It is from the decision of the Court of Civil Appeals that this appeal is taken.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States. This case also involves Code of Alabama, 1975, 40-2-22, the full text of which appears in the Appendix pages A-9 through A-17.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

An assessment was placed against the Appellant, James E. McLendon, Jr., (Taxpayer) arising out of sales purportedly made by him. The Alabama code, 1975, 40-2-22 requires in the case of a tax dispute that a notice of appeal be filed in the Circuit Court of the county in which the taxpayer resides, a copy going to the State department of revenue. Accompanying the notice must be payment of the tax or a supersedeas bond must be posted with the Clerk of the Circuit Court in twice the amount of the tax. The Taxpayer in a timely manner filed his notice of appeal and presented a bond which was thereupon marked "Rejected" by the Clerk.

In the notice of appeal, the Appellant asserted in part:

> "... that the arbitrary and capricious assessment by the State would be a deprivation of property without the process of law and the taking of his property without the right to be heard in direct contravention of the provision of the U.S. Constitution."

This was the first formal pleading filed in the court. The State department of revenue filed a Motion to Dismiss which was granted by the judge of the circuit court on the basis of a 1948 ruling of the State's highest court which found that the predecessor statute to 40-2-22 (T.51 Sec.140) did not unconstitutionally deny due process. No formal opinion was written by the circuit court judge.

A notice of the taking of an appeal from the decision of the circuit court

judge dismissing the tax appeal was made to the Supreme Court of Alabama as provided in the statute. The matter was transferred to the Court of Civil Appeals for review. The briefs of the Appellant included the following federal questions for consideration:

> "Is it a violation of the U.S. Constitution and the Constitution of the State of Alabama, using 40-2-22 of the 1975 Code of Alabama, to take property without providing for a trial on the merits?
>
> Is it unconstitutional to refuse a hearing before an impartial tribunal, pursuant to 40-2-22 of the Code of Alabama, before or after taking of property?"

The Court of Appeals in its decision erroneously found the only issue to be:

> "... whether 40-2-22 is unconstitutional in that it requires the payment of assessment or the execution of supersedeas bond before an effective appeal

may be had." (App. p. A-4)

The Court then stated the appellant's contentions concerning the statute as it understood them:

> "It was insisted... that the requirement of payment of the assessment or posting of the bond as a prerequisite to review was in violation of Alabama Const. art.1, 10 and 13 and the due process and equal protection clauses of the four teenth amendment to the U.S. Constitution." (App.p.A-5)

The court failed to address the question of the right to trial by an unbiased, unprejudiced and impartial tribunal. The decisions being rendered on the basis that ".. the right of appeal in tax proceedings is purely statutory and any concessions to the taxpayer in the nature of an appeal are concessions of favor." (App.p.A-6)

The Court of Civil Appeals erroneously concluded further:

> "The extent of as well as the procedure used to perfect an appeal under 40-2-22 is a matter of legislative competency to require the payment of taxes or the execution of a bond as a condition precedent to an action questioning the amount of taxes due." (App.p.A-7)

The Petition for Re-hearing again raised the federal questions regarding the constitutionality of 40-2-22 based on due process violations and cited recent United States Supreme Court decisions which are in direct opposition to decisions of the Alabama Supreme Court in taxpayer litigation. The petition was denied.

A Petition for Writ of Certiorari and brief in support thereof were timely filed with the Supreme Court of Alabama. In arguing that the due process procedure delineated by the decisions of the

United States Supreme Court were clearly not followed, the Taxpayer explained in part:

> "The decisions...are undisputedly at odds with the due process requirements for taxpayers set out by the U.S. Supreme Court in Commissioner v. Shapiro (supra), and procedural due process requirements set out in Fuentes v. Shevin (supra) and North Georgia Finishing v. Di-Chem (supra).
>
> This Petitioner urges that this Court should review and consider the recent rulings of the U.S. Supreme Court in the area of due process which were ignored by the Appellate Court.
>
> In San Antonio School District v. Rodriguez (supra) the U.S. Supreme Court set out the criteria under which financial ability for the exercise of fundamental rights becomes discriminatory. The Court in that case found that Equal Protection Clause of the Constitution requires "meaningful opportunity" for the exercise of fundamental rights. Section 40-2-22, Code of Alabama, is clearly unconstitutional by federal standards; and the older cases

which support the language of this staute are diametrically opposed to more recent U.S. Supreme Court cases.

The Alabama Supreme Court denied the writ of certiorari without rendering a separate opinion.

SUBSTANTUALITY OF FEDERAL QUESTIONS

As construed by Alabama'a appellate court and affirmed by its highest judiciary, Alabama Code, 1975, 40-2-22 prohibits a taxpayer, who has a constitutional right to a trial by an impartial tribunal, from the meaningful opportunity to obtain same, unless he is able to post a bond or pay the tax in dispute. This burden on the right to a trial guaranteed by the federal constitution solely on the basis of one's ability to pay raises serious questions under both the Due Process Clause and Equal Protection Clause of the Fourteenth

Amendment to the Constitution of the United States.

I

This state statute which requires posting a bond before allowing judicial review creates an artifical classification which discriminates against the poor in violation of the Equal Protection Clause of the Fourteenth Amendment.

The ability to pay is not a rational basis for denial of the fundamental right of due process. This statute fails to provide any alternative to payment of tax or posting of bond for those of impecunity. The lesson of this Court's decisions construing the Equal Protection Clause is that there can be no difference in treatment among citizens unless there is a rational distinction between the classes affected. Or, to put it another

way, where no rational distinction exists between two persons or classes, the law must treat them alike. By these standards, Alabama Code 40-2-22 is patently invidious, irrational, hence unconstitutional legislation. For purposes of the relevant constitutional requirement of fair and impartial trial, the ability to pay cannot reasonably dictate the character of the procedural protection offered.

The irrationality of making a trial on the merits available to one class of citizens faced with a tax assessment, while withholding it from another class is repugnant to judicial sensibilities. Under the reasoning of the Court below the legislative prerogative could incidentially collapse or expand the pro

tection of the fair trial with their requirements on the right of appeal from any administrative hearing. The Constitution cannot tolerate a rule which permits such irrational and arbitrary tampering with fundamental rights.

In San Antonio School District v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973), this learned tribunal set out the criteria under which financial ability for the exercise of a fundamental right becomes discriminatory. This Court found that a violation of a citizen's constitutional rights existed if "..because of their impecunity they were completely unable to pay for some desired benefit and as a consequence they sustained an absolute deprivation of meaningful opportunity to enjoy that benefit." (Emphasis added)

In Lindsey v. Normet, 405 U.S. 56, 31 L.Ed.2d 26, 92 S.Ct. 862 (1972), the U.S. Supreme Court had before it an appellate statute which required that a bond in double the amount of the judgment be filed by tenants in forcible entry and wrongful detainer (FED) actions. In formulating its decision that the statute was unconstitutional this court said in part as follows:

> "When an appeal is afforded ... it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause..."
>
> "It cannot be denied that the double-bond requirement heavily burdens the statutory right of a FED defendant to to Appeal..."
>
> "The discrimination against the poor...is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be.The non-indigent FED appellant also is confronted with a substantial barrier to

> appeal...The discrimination against the class of FED appellant is arbitrary and irrational, and the double-bond requirement...violates the Equal Protection clause."

The taxpayer in this action timely posted a bond to the best of his abilities in an attempt to comply with the statutory requirements, only to have it rejected by the clerk of the Circuit Court. Due to his impecunity, the taxpayer was denied his fundamental rights of due process. The availability of fundamental rights should never be dependent on the size of the citizen's purse.

In recent years, the Supreme Court has focused upon laws which in effect discriminate against individuals because of poverty. In Griffin v. Illinois, 351 U.S. 12 (1956), two indigent defendants could not appeal as otherwise they could

of right under Illinois law, because they could not afford a needed trial transcript. The state statute made such transcripts equally available to all who could pay the required fee. While recognizing that the Constitution does not necessarily require appellate review, the Court held that once a state grants review, it cannot do so "in a way that discriminates against some defendants on account of their property." 351 U.S. at 18.

This tribunal has stated:

> "Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceeding the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 18-19. See also

Douglas v. California, 372 U.S. 353 (1963). A host of subsequent decisions have strengthened the Griffin-Douglas line of reasoning. See Williams v. Oklahoma City, 395 U.S. 458 (1969)(per curiam); Gardner v. California, 393 U.S. 367; Long v. District Court, 385 U.S. 192 (1966)(per curiam); Rinaldi v. Yeager, 384 U.S. 305 (1966)."

Harper v. Virginia Board of Elections, 383 U.S. 663, regarding poll tax, decided by this Court in 1966, also illustrates the Court's concern with the effect of poverty upon the exercise of fundamental rights. The State had pointed out that it exacts fees for many purposes from its citizens. In reply to this argument the Court said:

"Wealth, like race, creed or color is not germane to one's ability to participate in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored. To introduce wealth or the payment of a fee as a measure of a voter's qualifications is to

> introduce a capricious or irrelevent factor. The degree of discrmination is irrelevant. In this context, that is, a condition of obtaining a ballot, the requirement of a fee paying causes an invidious discrimination..that runs counter to the equal protection clause." 383 U.S. at 668.

Equal protection concepts have matured in recent years. States are being required to take steps to remove criminal, civil and administrative inequities which are not directly the State's. If the granting of an appeal is as the Court of Civil Appeals has said:

> ".. purely statutory and any concession to the taxpayer in the nature of an appeal are concessions There is no inherent right to an appeal in these cases." (App.p.A-6)

Then the right to appeal should be equally available to all citizens regardless of pecuniary prowess. With the lien securely attached to the property of the

taxpayer the question of the payment of the tax has been assured and therefore there is no rational basis for denial of trial on the merits to determine whether the tax assessment is justified. The state is protected and the constitutional rights of the taxpayer are satified.

II

The Code of Alabama, 1975, 40-2-22 violates the Due Process Clause of the Fourteenth Amendment by providing for the taking of property to satisfy a tax assessment without providing for a pre-seizure or post-seizure trial on the merits before an impartial tribunal.

This Court has held that:

> "The due process right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions; the purpose of such requirement is not to ensure abstract fair play to the

> individual, but more particularly is to protect his use and possession of property from arbitrary encroachment, minimizing substantively unfair or mistaken deprivations of property." Fuentes v. Shevin, 407 U.S.67, 32 L.Ed.2d 556, 92 S.Ct.1983 (1972)

Just as the garnishment in the North Georgia Finishing Co. v. Di-Chem, 419 U.S. 601, 42 L.Ed.2d 750, 95 S.Ct. 719 (1975), amounted to a "taking of property" within the purview of the Fourteenth Amendment, so does the lien placed against the property of the Taxpayer equates a "taking" within the protection of the Constitution. While prohibiting any meaningful opportunity for judicial consideration of the assessed tax, additional provisions of the Code of Alabama provide for the property of the taxpayer to be levied upon and sold to satisfy the assessment.

Thus compounding the invidious nature of the constitutional violation.

Every taxpayer of Alabama whether under the obligation to pay income tax or sales tax (the type of tax out of which this case arises) has the same means of disputing a tax assessment placed against him by the Department of Revenue. He must either pay the tax or post a supersedeas bond in an amount twice that of the tax before he can appeal the decision of the state. The ability of the taxpayer to financially satisfy these requirements is of no consequence. There is no provision in the statute for the filing of a forma pauperis to stand in lieu of the payment in a tax dispute. There is no provision within 40-2-22 which allows for a hearing even after the lien has attached and the payment of the tax is assured.

In dealing with seizures to satisfy federal tax obligations, this tribunal has stated only in the case of a jeopardy assessment, i.e. one in which the government alleges that the property is likely to be dissipated by the taxpayer prior to a hearing on the merits, does the Court uphold a seizure prior to a hearing on the merits. It is understood that the government's interests should be protected from loss. However, even in the case of a "jeopardy" assessment the court requires a prompt post-seizure inquiry into the basis of the claimed assessment. The taxpayer has a right to judicial review without showing he can pay. (See Commissioner v. Shapiro, 424 U.S. 614, 47 L. Ed. 2d 278, 96 S. Ct. 1062 (1976). The judicial controls upon the exercise of governmental powers is no

less necessary for the states than it is for the federal government.

The Appellant heartily agrees with this Court finding:

> "Where...adequate opportunity is afforded for a judicial determination of the legal rights, summary proceedings to secure prompt performance have been consistently sustained. ("Emphasis added by Court) Commissioner v.Shapiro, (supra); Phillips v. Commissioner, 283 U. S. 589, 75 L. Ed. 1289, 51 S Ct. 608 (1931).

This judiciary body has found when dealing with the issue of seizure of taxpayers property to satisfy federal taxes, that "to permit the Government to seize and hold property on the mere good faith allegation of an unpaid tax would raise serious constitutional problems." Commissioner v. Shapiro (supra).

At no step during the tax assessing procedure is the taxpayer guaranteed to

have the merits of his disputed claim heard by a fair and impartial tribunal. In Mitchell v. Bell, 458 F. Supp. 1044 (1978), the U. S. Supreme Court explained that the fundamental requirement of due process is an impartial decision maker. Additionally this court held that procedural due process is required whenever an individual will be condemned to suffer a grievous loss, Diamond v. Thompson, 364 F. Supp, 659, affirmed 523 F. 2d 1201 (1973).

The State contends that the meeting which the taxpayer had with an administrative official of the Department of Revenue amounted to a "hearing" and therefore the procedural due process requirements were met.

Am. Jur. explains the requirements of due process for administrative hearings as follows:

> Procedural due process in this respect required at a minimum an orderly proceeding appropriate to the case or adapted to its nature, just as the parties affected, and adapted to the ends to be sustained; one in which a person has an opportunity to be heard, and to defend, enforce and protect his rights before a competent and impartial tribunal legally constituted to determine the rights involved, representation by counsel; procedure at the hearing consistent with the essentials of a fair trial according to established rules which do not violate fundamental rights and in conformity to statutes and rules, conducted in such a way that there will be opportunity for a court to determine whether applicable rules of law and procedure were observed; revelation on the evidence and reason. 2 Am. Jur. Administrative Law, Sec. 353

This Court will note that the assessment of sales tax and notice thereof (App. p.A-18) fails to set forth specifically the facts out of which the tax arises, the nature of the hearing to be had or the consequences should he

fail to attend the hearing. The Final Assessment of Sales Tax and Notice Therof (App. p. A-20) has the full force and effect of a final judgment, yet other than the amount of the tax, penalty, interest and total amount assessed, there is no finding of facts or basis for the judgment given which can be attacked on appeal. There is a right to a trial de novo in the Circuit Court only if the taxpayer can afford to pay the tax or post a supersedeas bond in twice the amount of the tax. The amount of tax in question in this case was $15,087.58 or a bond required of $30,165.16. One can but wonder what price is justice.

As one federal court most profoundly expressed it:

> "Just and fair trial by unbiased, unprejudiced and impartial tribunal is one of the great American Constitutional

principles, and there can be no due process or equal protection unless that principle remains inviolate." Billingsley v. Clayton, 359 F.2d 12, certiroari denied 87 S.Ct. 92, 385 U.S. 841, 17 L.Ed. 2d 74 (1966).

CONCLUSION

FOR THE REASONS SET FORTH IN THE STATEMENT, PROBABLE JURISDICTION SHOULD BE NOTED.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the foregoing Jurisdictional Statement has been served via U.S. mail, postage prepaid, the 24 day of Sept, 1981, upon Charles A. Graddick, Attorney General, State of Alabama, B. Frank Loeb,

Assistant Counsel, Department of Revenue, and Assistant Attorney General, State of Alabama, Room 201 Administrative Building, Montgomery, Alabama 36130.

Leo E. Costello
Attorney

APPENDIX

THE STATE OF ALABAMA__JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

SPECIAL TERM 1980

Civ. 2317

James E. McLendon, Jr.

v.

State Department of Revenue

Appealed from Jefferson County Circuit Court

WRIGHT, Presiding Judge

Taxpayer appeals from an order by the Circuit Court of Jefferson County dismissing his appeal to that court of a final assessment for sales tax. We affirm.

In October 1979, the Alabama Department of Revenue made an assessment against taxpayer for sales taxes due of $15,087.58 including penalty and interest thereon. Taxpayer appeared at the hearing provided by law and protested the assessment. From this hearing it was determined the amount due should be corrected. On January 9, 1980, the assessment was made final in the amount of $14,955.51. On February 4, 1980, taxpayer filed notice of appeal in the circuit court pursuant to Sec.40-2-22, Code of Alabama (1975). Section 40-2-22 provides taxpayers a procedure for appeal from a final assessment of sales tax. The Statute provides:

> If any taxpayer against whom an assessment is made by the department of revenue...is dissatisfied with the final assessment as fixed by the said department of revenue, he may

> appeal from said assessment...to the circuit court of the county in which the taxpayer resides. The taxpayer shall pay the assessment so made before the same shall become delinquent, and, if such taxes are not paid before the same becomes delinquent, the court shall upon motion ex mero motu dismiss such appeal, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond... in double the amount of the taxes payable to the State of Alabama...

Taxpayer failed to pay the assessment before it became delinquent. He mailed notice of appeal to the Secretary of the Alabama Department of Revenue along with an attached affidavit that he had been "unable to find anybody to make a supersedeas bond which would be acceptable to the Circuit Court Clerk." A supersedeas bond marked "Rejected" by the circuit clerk was also attached.

On February 13, 1980, the State moved to dismiss the appeal on the

grounds that the assessment had not been paid and no supersedeas bond had been executed as required by the statute. The motion was granted at a hearing on March 13, 1980. On April 10 taxpayer appealed to the Alabama Supreme Court. The case was properly transferred to this court.

There is only one issue facing us in this case. That issue is whether Sec. 40-2-22 is unconstitutional in that it requires the payment of assessment or the execution of supersedeas bond before an effective appeal may be had.

Title 51, Sec.140, Code of Alabama (1940)(Recomp. 1958)(Supp.1973) is the predecessor to Sec.40-2-22. The appellate courts of this state have, in numerous cases and against varying attacks, continuously upheld the validity of the statute.

Ex parte State ex rel Attorney General, 252 Ala. 149, 39 So.2d 669 (1949) is the cornerstone case upon which the constitutionality of the statute rests. In that case the Alabama Supreme Court was presented with facts almost identical to those presently under scrutiny. The taxpayers had filed an appeal with the circuit court of his county of residence and the Secretary of the Department of Revenue. He attached a document entitled "Affidavit as to inability to pay taxes and supersedeas bond." The State filed a motion to dismiss which was overruled by the circuit judge. The State then sought a writ of mandamus compelling the judge to dismiss the appeal.

It was insisted in that case, as it is here, that the requirement of payment

of the assessment or posting of the bond as a prerequisite to review was in violation of Ala. Const. art. 1, Sec.10 and 13 and the due process and equal protection clauses of the fourteenth amendment to the U.S. Constitution. The Alabama Supreme Court held that the forerunner to Sec. 40-2-22 did not violate these constitutional provisions.

The court upheld Title 51, Sec.140 again, this time affirming the trial court's granting of the State's motion to dismiss, against a similar attack in Howell v. State, 282 Ala. 464, 213 So.2d 199 (1968).

The right of appeal in tax proceedings is purely statutory and any concessions to the taxpayer in the nature of an appeal are concessions of favor. There is no inherent right to an appeal

in these cases. State v. Golden, 283 Ala. 706, 220 So.2d 893 (1969).

The extent of as well as the procedure used to perfect an appeal under Sec. 40-2-22 is a matter of legislative discretion, and it is within legislative competency to require the payment of taxes or the execution of a bond as a condition precedent to an action questioning the amount of taxes due. State v. Golden, supra; Ex parte State ex rel Attorney General, supra.

Section 40-2-22 is neutral on its face and in its application. The court affirms the constitutionality of the statute and the dismissal by the circuit court based on the cases cited above.

AFFIRMED.

BRADLEY and HOLMES, JJ., Concur.

I, John H. Wilkerson, Jr., Clerk of the Court of Civ. Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument herewith set out as same appears of record in said court. Witness my hand this 17th day of Sept., 1980.

John H. Wilkerson

(Signature)

Sec. 40-2-22. Appeals from final assessments - Right; procedure generally; effect of final judgment.

Either the state or the taxpayer may appeal from any final assessment made by the department of revenue under any assessment required by law to be made by the department of revenue. If the appeal is by the state, such appeal shall be made by the attorney general filing the written notice with the secretary of the department of revenue and with the clerk or register of the circuit court of Montgomery county within 30 days after such assessment is made final. The department of revenue shall immediately give notice by certified or registered mail to the taxpayer of the filing of such appeal by the state. If any

taxpayer against whom an assessment is made by the department of revenue under any assessment required by law to be made by the department of revenue is dissatified with the final assessment as fixed by the said department of revenue, he may appeal from said final assessment to the circuit court of the county in which the taxpayer resides, if the taxpayer has within the state a permanent residence, at the option of the taxpayer, by filing notice of appeal with the secretary of the department of revenue and with the clerk or register of the circuit court of the county to which the appeal shall be taken within 30 days from the date of said final assessment made and entered on the minutes of the department as required by law and, in addition thereto, by giving bond

conditioned to pay all costs to be filed with and approved by the clerk or register of the court to which the appeal shall be taken. The taxpayer shall pay the assessment so made before the same shall become delinquent; and, if such taxes are not paid before delinquent, the court shall upon motion ex mero motu dismiss such appeal, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the clerk or register of the court to which the appeal shall be taken in double the amount of the taxes payable to the state of Alabama, conditioned to pay all taxes, interest and costs due the state, county or any agency or subdivision thereof. In

such appeals the party taking the appeal shall be styled the appellant and the party against whom the appeal is taken shall be styled the appellee. The assessment made by the department of revenue shall prima facie be correct, and where the appeal is taken by the taxpayer the burden shall be on the appellant to show that such assessment is incorrect. The circuit court or the supreme court of Alabama on appeal to it may, if it is of the opinion from all the evidence that the assessment as made is either too high or too low, fix the amount of such assessment. The court shall hear such appeals according to its own rules and methods or procedures so far as practicable and shall decide all questions both as to the legality of the assessment and

the amount thereof. No court shall have the power to enjoin the collection of any taxes due on such assessment so appealed or to suspend the payment thereof. From the judgment of the circuit court, either the state or the taxpayer may appeal direct to the supreme court of Alabama, within 42 days from the entry of the judgment; the taxpayer shall give security for the cost of such appeal to be approved by the clerk or register of the circuit court from which the appeal shall be taken. If upon such appeal the assessment made by the department of revenue is reduced, the court, upon proof of payment of said tax, shall ascertain and recite such fact in the judgment and shall ascertain and determine by its judgment, the amount of tax which was

invalid or which was excessive both as to the amount paid to the state, counties, county boards of education, municipalities or other governmental agencies receiving any of such taxes; and upon presentation of a certified copy of the judgment to the comptroller, it shall be the duty of the comptroller to draw his warrant on the treasurer in favor of such taxpayer for such an amount as the judgment of the court shall ascertain and declare has been erroneously paid to the state, together with interest from the date of payment, and such warrant of the comptroller shall be paid out of any funds in the treasury as a current obligation of the year in which said refund is ordered. Upon presentation of a certified copy of such judgment to the

county commission of any county, or upon presentation of a certified copy of such judgment to a county board of education or to the city council or other governing body of any municipality, or upon presentation of a certified copy to the governing body of any other agency of the state which may have received any part of said tax erroneously paid as determined by the judgment, it shall be the duty of said county commission of the county or the county board of education or the city council or other governmental body of a municipality, or of the governmental body of any other agency receiving any part of such taxes to draw its warrant on the treasurer of such county, school board, municipality or other agency in favor of the taxpayer for such amount of said tax

as may have been erroneously paid to such county, school board, municipality or other agency, together with interest from the date of payment. Such amounts shall constitute claims preferred over all other claims, and the respective treasurers are hereby required to refund such amounts received by said county, school board, municipality or other agency. In the event the judgment of the court shall fix an assessment greater than that appealed from when the taxpayer has paid the taxes on the assessment appealed from, the court shall fix and determine the amount of such excess, and the taxpayer and the sureties on his appeal bond shall be adjudged to pay the taxes due by reason of such increased assessment with interest from the date of

judgment, and the lien and priorities of the state and counties shall apply to such additional amount as in other cases. The court, in fixing the assessment, shall order the assessing authorities to apportion the same and the collecting authorities to collect taxes thereon for the several subdivisions in the manner provided by law. Where the taxpayer elects to make supersedeas bond and not to pay the taxes, the court in entering final judgment shall order that interest at the legal rate shall be paid on such assessment as finally made from the date that such taxes would have become delinquent on the original assessment.(Acts 1935, No.194, p.256; Ex. Sess., No.154, p.172; Code 1940, T.51 Sec.140.)

STATE OF ALABAMA

DEPARTMENT OF REVENUE

Montgomery, Alabama 36130

ASSESSMENT OF SALES TAX AND NOTICE THEREOF
(Deficiency)

STATE OF ALABAMA

VS.

James E. McLendon, Jr.
610 Esplanade Drive
Birmingham, AL 35206

(Taxpayer)

WHEREAS, the above named Taxpayer having made a return or returns to the State Department of Revenue, under the provisions of Section 40-23-1, et. seq., Code of Alabama 1975, and amendments thereto, purporting to show the amount of sales tax due by said Taxpayer for the period July 1, 1976 through June 30, 1979; and

WHEREAS, upon examining and auditing the records of the Taxpayer, or from other information, the Department having ascertained and determined that the amount pre viously paid by the Taxpayer for said period is incorrect, the amount of tax paid being less than the amount due by said Taxpayer for said period; and

WHEREAS, the Department having computed the amount of such deficiency, notice of which was given to said Taxpayer, and demand for the payment thereof having been made as provided by law; and

WHEREAS, said Taxpayer having failed to pay such additional tax within ten days from the date of such demand;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the State Department of Revenue, as authorized and provided by law, that there be and there is hereby assessed against said Taxpayer for said period the following amount of additional sales tax, penalty and interest thereon, namely:

Additional Sales Tax for said period	$12,660.76
Penalty thereon ½ of 1%	1,213.41
Interest on said tax from the date the same became due to 10/20/79	1,213.41
Total amount assessed	$15,087.58

IT IS FURTHER ORDERED that a hearing upon said assessment be and the same is hereby set for November 21, 1979 at 2:00 p.m., before the State Department of Revenue at the Administrative Building, Room 300, 64 North Union Street, Montgomery, Alabama, at which time the Taxpayer may appear and show cause, if any, why said assessment should not be made final.

IT IS ALSO ORDERED that a copy of this assessment be mailed to the Taxpayer by registered mail, return receipt requested, as notice of said assessment and of the time and place for the hearing thereon, as is provided by law.

DONE by the Department of Revenue, State of Alabama, under its official seal this date of October 1 1979.

DEPARTMENT OF REVENUE
STATE OF ALABAMA

By Ernest J. Lisenby (LS)
Hearings Officer
Sales and Use Tax Division

NOTE: Any check or remittance in payment of said assessment should include additional interest on the amount of the tax at the rate of one-half of one percent (½ of 1%) per month, or fraction thereof, to and including the date the remittance is received by the Department of Revenue.

cc: None

202-005

STATE OF ALABAMA

DEPARTMENT OF REVENUE

Montgomery, Alabama 36130

FINAL ASSESSMENT OF SALES TAX AND NOTICE THEREOF
(Changed on Hearing)

STATE OF ALABAMA
VS.

James E. McLendon, Jr.
610 Esplanade Drive
Birmingham, AL 35206

(Taxpayer)

WHEREAS, on October 16, 1979, under the provisions of Section 40-23-1, et. seq., Code of Alabama 1975, and amendments thereto, an assessment was made by the State Department of Revenue against the above named Taxpayer for sales tax, penalty and interest thereon, due by said Taxpayer for the period July 1, 1976 through June 30, 1979, and in the amount as follows:

Sales Tax for said period	$12,660.76
Penalty thereon ½ of 1%	1,213.41
Interest on said tax from the date the same became due to 10/20/79	1,213.41
Total amount assessed	$15,087.58

WHEREAS, notice of said assessment and of the day set for the hearing thereof was given to said Taxpayer, as provided by law, to appear and show cause, if any, why said assessment should not be made final; and

WHEREAS, on the day set for said hearing, said Taxpayer appeared and objected or protested against said assessment; and

WHEREAS, it appears to the Department that said assessment is incorrect and should be changed or corrected as hereinafter set forth, and as so corrected should be made final.

IT IS, THEREFORE, ORDERED by the State Department of Revenue that said assessment made against said Taxpayer, as provided by law, for sales tax, penalty and interest thereon, for said period be and the same is hereby changed and corrected so as to make said assessment as follows:

Sales Tax for said period	$12,231.87
Penalty thereon ½ of 1%	1,361.82
Interest on said tax from the date the same became due to 1/20/80	1,361.82
Total amount assessed	$14,955.51

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said assessment, as herein changed and corrected, be and the same is hereby made final, and that execution be issued thereon.

IT IS ALSO ORDERED by the State Department of Revenue that a copy of this assessment be sent to the Taxpayer by registered mail, return receipt requested, a notice that said assessment has been made final in the above stated amount.

DONE by the Department of Revenue, State of Alabama, under [illegible] official seal this date of January 9 1980

DEPARTMENT OF REVENUE
STATE OF ALABAMA

By _____ (L.S.)
Assistant Commissioner of Revenue

NOTE: If you are dissatisfied with this final assessment, an appeal therefrom may be taken within thirty days from the date of said final assessment, pursuant to the provisions of Section 40-2-22, Code of Alabama 1975.

Remittance offered in payment of said assessment should include additional interest on the total amount of the assessment at the rate of six percent (6%) per annum from the date of final assessment to and including the date the remittance is received by the Department of Revenue.

cc: Joe E. Costello, Attorney
031/37-27416/36/6-79/1-80/$14,955/$14,955
202-007

No. 80-1818

In the Supreme Court of the United States

October Term, 1980

FILED
JUN 1 1981
ALEXANDER L. STEVAS
CLERK

JAMES E. MCLENDON, JR.,

Appellant

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

Appellee

ON APPEAL FROM THE ALABAMA COURT
OF CIVIL APPEALS

MOTION TO DISMISS APPEAL

CHARLES A. GRADDICK
HERBERT I. BURSON, JR.,
B. FRANK LOEB,
201 Administrative Building
Montgomery, Alabama 36130
(205) 832-5640

COUNSEL FOR APPELLEE

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No. 80-1818

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JAMES E. MCLENDON, JR.,

Appellant

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

Appellee

ON APPEAL FROM THE ALABAMA COURT
OF CIVIL APPEALS

MOTION TO DISMISS APPEAL

May it please the Court:

Appellee, pursuant to Rule 16 of this Honorable Court, moves that the appeal in this cause as filed by Appellant be dismissed.

I. GROUNDS FOR MOTION TO DISMISS APPEAL

Appellee's Motion to Dismiss is predicated upon the following grounds:

A. FAILURE TO COMPLY WITH RULES OF UNITED STATES SUPREME COURT

Appellant failed to comply with the Rules of this Court for perfecting an appeal in that: (1) for failure to take the appeal within the time allowed by law, (2) for failure to file a properly completed jurisdictional statement within the time allowed by the rules of this Court for docketing the appeal, and (3) for failure to show a proper statutory authority conferring jurisdiction upon this Court to hear this appeal.

(1) Notice Of Appeal Not Timely Filed

The time for filing a notice of appeal from a state court judgment for review by this Court is controlled by 28 U.S.C. § 2101(c), which provides the appeal must be taken within 90 days after entry of the judgment or decree which is the subject of the appeal.

In this cause, the Alabama Supreme Court on January 30, 1981 denied a Writ of Certiorari sought by the Appellant herein to review the decision of the Alabama

Court of Civil Appeals. (395 So.2d 73). The 90th, and last day, to timely file the Notice of Appeal with the Alabama Court of Civil Appeals was April 30, 1981. The Notice of Appeal was actually filed on May 6, 1981 - 96 days after the denial or the Writ of Certiorari by the Alabama Supreme Court. (App., p. A-2).

The Notice of Appeal was transmitted by the Appellant to the Alabama Court of Civil Appeals by regular first class mail, and was received by the Clerk of that court on May 6, 1981. The Alabama Rules of Appellate Procedure (ARAP) provide that filing is accomplished when the document is received by the clerk, unless certified or registered mail is used. Rule 25(a), ARAP. (App., p. A-1). Since the rules of this Court do not prescribe the manner of filing with the court whose decision is being appealed, it appears the rules of the court where the notice is to be filed would control the manner of filing.

Furthermore, even if filing was accomplished upon mailing by regular mail, as provided by Rule 28.3 of this Court, the notice was not timely mailed to the Clerk of the Alabama Court of Civil Appeals. The official postmark of the

United States Postal Service placed upon the envelope containing the Notice addressed to the Clerk of the Court of Civil Appeals shows conclusively that it was mailed on the afternoon of May 4, 1981, more than 90 days after the decision of the Alabama Supreme Court. Attached hereto as exhibits 2 and 3 (pages A-2 and A-3 of Appendix) are certified copies of the Notice of Appeal as filed with the Clerk of the Alabama Court of Civil Appeals and the envelope in which the Notice was mailed to the Clerk.

Rule 11.4 of this Court, provides that the time for filing the Notice of Appeal may not be extended.

(2) Jurisdictional Statement Not Completed Upon Filing

The rules of this Court require the Appellant to docket the case within 90 days of the entry of the judgment or decree being appealed. Rule 12.1. Further, Rule 12.3 requires the Appellant, at the time of docketing the case, to file 40 copies of the jurisdictional statement, "which shall comply in all respects with Rule 15." (emphasis added)

Rule 15, which outlines the items to be included in the jurisdictional statement, at subsection .1(j)(iv) requires the appendix to the jurisdictional statement to contain "A copy of the notice of appeal showing the date it was filed and the name of the court where it was filed." A copy of the Notice of Appeal was not included in the jurisdictional statement filed by the Appellant contrary to Rule 15.

Furthermore, had the Appellant properly included a copy of the Notice of Appeal in the jurisdictional statement, the case probably would not have been placed on the docket by the Clerk because Rule 12.1 provides: "The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed."

The Notice of Appeal, if it had been included in the jurisdictional statement, would have shown conclusively that it was not timely filed. It would have shown clearly that it was filed with the Alabama Court of Civil Appeals 96 days after denial of the Writ of Certiorari by the Alabama Supreme Court - 6 days later than the maximum time allowed by law and by the rules of this Court.

(3) No Statute Cited Conferring Jurisdiction

The Notice of Appeal prepared by the Appellant, and the Jurisdictional Statement submitted by the Appellant to this Court asserts that jurisdiction for this purported appeal is ". . .pursuant to 28 U.S.C. 1275(2)," (page 2, Appellant's Jurisdictional Statement). At the time the Notice of Appeal and Jurisdictional Statement were prepared, and at the present time, Title 28, United States Code does not contain a section "1275(2)." It thus appears the Appellant has based his appeal upon a non-existent statute or has misstated the correct statute upon which an appeal may be brought.

B. LACK OF A SUBSTANTIAL FEDERAL QUESTION

As further ground for dismissing this appeal, Appellee states that such appeal does not present a substantial federal question. In Springer v. United States, 102 U.S. 586, 594, 26 L.Ed. 253, 256 this Court stated:

> The prompt payment of taxes is always important to the public welfare. It may be vital to the

> existence of a government. The idea that every tax payer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress or the people who make congresses to see that the evil was corrected. The remedy does not lie with the judicial branch of the Government.

In Phillips v. C.I.R., 283 U.S. 589, 596, 51 S.Ct. 608, 611 this Court also stated that:

> Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. (cite omitted).

In the present case, not only was the Appellant granted an administrative hearing, but the assessment was actually changed based on information presented at the hearing. (Appellant's Jurisdictional Statement, page A-18 and A-19).

In addition, it is submitted that the state statute in question, §40-2-22 Code of Alabama 1975, which is set forth in Appellant's Jurisdictional Statement at A-9 through A-17, does provide the taxpayer with an adequate opportunity for an ultimate judicial determination of his tax liability. The taxpayer may pay the tax or post a supersedeas bond in double the amount of the assessment as security for the tax, interest and costs and file an appeal with the appropriate state circuit court.

In the Phillips case, supra, the taxpayer raised a constitutional objection to the requirement that a bond is required to be filed before collection will be stayed while a case is pending before the Circuit Court of Appeals. In addressing the objection, this Court stated:

> As to the first of these objections, it has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery is paramount. The privilege of delaying payment pending immediate judicial review, by filing

a bond, was granted by the soverign as a matter of grace solely for the convenience of the taxpayer. (283 U.S. 589, 599, 51 S.Ct. 608, 612).

II. CONCLUSION

Appellee moves this Court, in view of the foregoing grounds presented herein, to grant its Motion to Dismiss this appeal for lack of jurisdiction, failure to comply with the rules of this Court, and want of a substantial federal question.

Respectfully submitted,

Charles A. Graddick

CHARLES A. GRADDICK
Attorney General
State of Alabama

Herbert I. Burson, Jr.

HERBERT I. BURSON, JR.
COUNSEL, Department of
Revenue and Assistant
Attorney General

B. Frank Loeb

B. FRANK LOEB, Assistant
Counsel, Department of
Revenue and Assistant
Attorney General
201 Administrative Building
Montgomery, Alabama 36130

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I, B. Frank Loeb, of Counsel for Appellee and a Member of the Bar of the Supreme Court of the United States, certify that I have served three copies of the foregoing Motion to Dismiss on the Honorable Leo E. Costello, Attorney for Appellant by depositing same in the United States post office, with first class postage prepaid, addressed to him at 3716 Fifth Avenue, South, Birmingham, AL 35222, this the 27th day of May, 1981.

B. Frank Loeb

B. FRANK LOEB

OF COUNSEL FOR APPELLEE

APPENDIX

EXHIBIT 1

Alabama Rules of Appellate Procedure

RULE 25

FILING AND SERVICE

(a) Filing. Papers required or permitted to be filed in an Appellate Court shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that papers shall be deemed filed on the day of mailing if certified or registered mail is utilized.

* * *

IN THE SUPREME COURT OF THE STATE OF ALABAMA

JAMES E. McLENDON, JR., *

Appellant, *

Vs. * Case No. 2317

STATE OF ALABAMA *
DEPARTMENT OF REVENUE, *

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James E. McLendon, Jr., the Appellant above named, hereby appeals to the Supreme Court of the United States, from the final judgment of the Alabama Court of Civil Appeals entered in this action on September 17th, 1981.

This appeal is taken pursuant to 28 U.S.C. 1275(2).

COSTELLO & STOTT
Attorneys for Appellant

By _____
3716 South 5th Avenue
Birmingham, Alabama 35222
(205) 591-6920

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal has been served on Charles Graddick, Attorney General, State of Alabama, B. Frank Loeb, Assistant Counsel, Department of Revenue, and Assistant Attorney General, State of Alabama, Room 201 Adminstrative Building, Montgomery, Alabama 36130. Dated this the 14 day of May, 1981.

_____
Of Counsel

I, John H. Wilkerson, Jr., Clerk of the Court of Civ. Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court. Witness my hand this 13 day of May, 1981.

John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

EXHIBIT 2

Certified copy of Notice of Appeal filed with Clerk of Alabama Court of Civil Appeals.

EXHIBIT 3

Certified Copy o envelope used to mail Notice of Appeal.

COSTELLO & STOTT
ATTORNEYS AT LAW
3716 SOUTH 5TH AVENUE
BIRMINGHAM, ALABAMA 35222

Court of Civil Appeals of Alabama
2600 East South Boulevard
Room 250
Montgomery, Alabama 36116

I, John H. Wilkerson, Jr., Clerk of the Court of Civ. Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument herewith set out as same appears of record in said court. Witness my hand this 13th day of _____, 1981

Clerk, Court of Civil Appeals of Alabama